## AUTHORITIES CITED


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| *Admiral Merchants Motor Freight, Inc.* v. *U. S.*, 321 F. Supp. 353 (D. Colo. 1971) | 2, 4, 5 |
| *Mechling Barge Lines, Inc.* v. *U. S.*, 368 U.S. 324 (1961) | 2, 3, 4 |
| *Middlewest Motor Freight Bureau* v. *U. S.*, 433 F. 2d 212 (8th Cir. 1970), cert. den. 402 U.S. 999 (1970) | 4, n1 |
| *U. S.* v. *Munsingwear*, 340 U.S. 36 (1950) | 2, 3, 4 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

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No. 73-1751

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RINGSBY TRUCK LINES, INC., ET AL.,
*Petitioners,*

v.

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND THE DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,
*Respondents.*

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## PETITIONERS' REPLY BRIEF

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The question presented is whether or not Court of Appeals has jurisdiction of an appeal from a judgment of a three-judge District Court in a suit by motor carriers to set aside an order of the Interstate Commerce Commission finding increased rates not shown to be just and reasonable. The Court of Appeals held that it had such jurisdiction because occurrences after the entry of the order made it "essentially one for the payment of money and [therefore] properly reviewable by a one-judge rather than a three-judge district court." (App. to Pet., p. 7a). The "special and important" reason for the issuance of the writ is that the decision is squarely in conflict with the decision of the three-judge District

Court in *Admiral Merchants Motor Freight, Inc.* v. *U. S.*, 321 F. Supp. 353 (D. Colo. 1971) and this Court's affirmance of that decision at 404 U.S. 802 (1971). Respondents, unable to deny or explain away the conflict, choose to ignore it. They do not even cite *Admiral Merchants*, much less discuss it or attempt to distinguish it.

Respondents' basic premise is that the District Court's judgment must be reviewable someplace. Since this Court declined to review it, the only place left is the Court of Appeals. The premise is false. *U. S.* v. *Munsingwear*, 340 U.S. 36 (1950), and cases there cited make clear that supervening events may render a judgment of a District Court unreviewable. So too, supervening events may render an order of the Commission unreviewable. *Mechling Barge Lines, Inc.* v. *U. S.*, 368 U.S. 324 (1961). *Mechling* held that when the validity *vel non* of an order need not be determined because the plaintiff no longer needs relief from it, the proper disposition of the case by the three-judge court is to vacate the order so that no party will be concluded by it. That is the situation here and what the District Court did here. Since the increase to which the Commission's order was addressed had been superseded by further increases, the carriers no longer needed relief from it. Hence, there was no need to determine, and the Court did not determine, the validity of the order. Rather, it simply set it aside.

Respondents seek to distinguish *Mechling* in three ways. Dealing with the first two, the rule of *Mechling* is that when judicial review of the Commission's resolution of issues is foreclosed because its order incorporating that resolution is moot, the order is to be vacated so that it will not conclude any party in other litigation. The reason for the rule—to prevent a plea of *res judicata* grounded on an unreviewed order—compels its application whether the other litigation has been commenced in the same court by way of a counterclaim, as here, or

not yet been commenced in any court, as there. Indeed, the fact that the other litigation is pending makes a stronger case than if it were merely what Respondents call "prospective or speculative."

As for the third distinction, it simply does not exist. Respondents point out that in neither *Mechling* nor *Munsingwear* could the reviewing courts grant the relief sought in the cases before them because the orders from which relief was sought had become inoperative. That is equally true here. The rate increase which the order of the Commission from which the carriers' sought relief required to be cancelled had been superseded by further increases at the time the District Court rendered its judgment. Hence, the order was inoperative.

Respondents say that, unless the Court of Appeals has jurisdiction to review the judgment of the three-judge Court here, the denial of their counterclaim for restitution is immune from appellate review. This is simply not so. Contrary to Respondents' claim (Br., p. 8), the District Court did not hold "that the passage of time extinguished the shipper counterclaim." There has been no denial of the counterclaim. As Respondents themselves point out, their counterclaim (a) was not entertained by the three-judge District Court, (b) is a claim for a single-judge court and (c) is still pending.

Respondents argue that their counterclaim "depends critically on the validity of the Commission rate order and hence will be foreclosed by any judgment of the trial court which vacates the rate order as invalid." (Br., p. 13). We agree. But the judgment of the three-judge court did not vacate the Commission's order as invalid. On the contrary, the Court specifically refrained from determining the validity of the order. Hence its judgment does not foreclose the counterclaim. The counterclaim has yet to be heard and judgment thereon yet to

be entered. Be that judgment for or against Respondents, it will be reviewable by the Court of Appeals.[1]

We submit that our Petition sets forth a special and important reason for the issuance of a writ of certiorari, namely, a conflict between the decision of the Court of Appeals and the decisions of this Court in *Admiral Merchants*, *Mechling* and *Munsingwear*. Respondents have not shown that the conflict does not exist. Indeed, they make no attempt whatever to deny or explain away the

[1] This makes clear the distinction between this case and *Middlewest Motor Freight Bureau* v. *U. S.*, 433 F. 2d 212 (8th Cir. 1970), cert. den. 402 U.S. 999 (1970). There the carriers dismissed their suit challenging the Commission's order finding increased rates unreasonable, thus rendering that order final and valid. The District Court then entertained and rendered judgment on the shippers' counterclaim for restitution. Jurisdiction to review that judgment was of course in the Court of Appeals.

conflict with *Admiral Merchants*. We therefore urge that a writ issue.

Respectfully submitted,

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September 25, 1974

## CERTIFICATE OF SERVICE

I, Bryce Rea, Jr., one of counsel for petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 26th day of September, 1974, I mailed copies of the foregoing document, first class postage prepaid, to the following:

Honorable William B. Saxbe, Attorney General, Department of Justice, Washington, D. C. 20530, Honorable Robert H. Bork, Solicitor General, Department of Justice, Washington, D. C. 20530, and Honorable James L. Treece, United States Attorney, 323 United States Court House, Denver, Colorado 80202.

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BRYCE REA, JR.